Southern Investment Bank Bhd/Southern Bank & Anor v Yap Fat & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-96–04 OF 2016
ZAWAWI SALLEH, ABDUL RAHMAN SEBLI AND PRASAD ABRAHAM JJCA
16 MARCH 2017

Labour Law — Constructive dismissal — Whether allegation of constructive dismissal proven — Employee in letter to employer claiming constructive dismissal gave three months' contractual notice of resignation and continued to work the three months receiving usual salary and benefits — Whether employee failed to prove any breach of employment contract by employer — Whether employee's decision to continue working during three months' notice of resignation negated allegation he had been constructively dismissed — Whether evidence showed employee voluntarily resigned

The instant appeal was against the High Court's dismissal of the appellants' application for judicial review to quash an award of the Industrial Court which found the first appellant had dismissed the first respondent ('Yap Fat') from employment without just cause or excuse. In his employment, Yap Fat had risen to the position of acting chief executive officer ('CEO') and had also headed the bank's Capital Market Department. On 12 July 2005, Yap Fat wrote to the first appellant stating that he considered himself to have been constructively dismissed with effect from 12 July 2005; yet, in that same letter he gave the bank three months' notice of his resignation as required by his employment contract and continued working for those three months receiving his usual salary and benefits. In upholding the Industrial Court's finding that Yap Fat had been unfairly dismissed, the High Court held that Yap Fat was not paid salary increment or bonus for the years 2004 and 2005 and that the transfer of the 'agency' function from his portfolio to the bank's Credit Administrative Department was a demotion and/or victimisation. In the instant appeal, the appellants argued that Yap Fat was not constructively dismissed but that he had voluntarily resigned by giving notice of resignation as per his employment contract and that during that notice period he continued to receive his monthly salary and other contractual benefits.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) In the overall conspectus of evidence adduced in this appeal, the constructive dismissal contended for by Yap Fat was devoid of substance and he failed to discharge the onus of proving that there was any breach

of the employment contract by the appellant, let alone one which went to the root of the contract justifying his resignation (see para 18).

(2) The allegation that the new CEO withheld payment of Yap Fat's salary increment and bonus was anchored in an email which when scrutinised by this court showed that nowhere in it was there any instructions by the new CEO to withhold payment of bonus and salary to Yap Fat. The email was general in nature and did not make any reference whatsoever to Yap Fat. Our courts had consistently recognised and upheld that any annual increment of salary or payment of bonus was at the absolute discretion of the management. As for the transfer of the 'agency' function from Yap Fat's portfolio, this was the prerogative of the CEO and was carried out in line with the structural revamping instructed by the new CEO. These actions could not be construed as a breach going to the root of the employment relationship between Yap Fat and the appellants. The removal of certain duties and responsibilities from Yap Fat's portfolio did not constitute a demotion as he continued to enjoy his monthly salary along with other benefits accorded to him under his employment contract during the three months' notice period (see paras 22–23 & 25–26).

(3) The three months' notice given in Yap Fat's letter of 12 July 2005 was a voluntary exercise of his right under his employment contract and the appellants had merely accepted his notice of resignation. It was not shown that the letter was tainted with deceit or coercion. Yap Fat's delay of approximately five months in leaving employment went to show that there was never any conduct by the appellants which rendered his continued employment impossible, unreasonable and unbearable as alleged by him. In a claim for constructive dismissal, it was imperative for the employee to take immediate steps to walk out of his employment within a reasonable time after the alleged breach of contract failing which the employee would be deemed to have waived the breach and agreed to vary the contract (see paras 27–30).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap penolakan Mahkamah Tinggi terhadap permohonan perayu-perayu untuk semakan kehakiman untuk membatalkan award Mahkamah Perusahaan yang mendapati perayu pertama telah membuang responden pertama ('Yap Fat') daripada pekerjaan tanpa sebab atau alasan. Dalam pekerjaannya, Yap Fat telah mencapai kepada jawatan pemangku ketua eksekutif ('CEO') dan juga mengetuai Jabatan Pasaran Modal bank. Pada 12 Julai 2005, Yap Fat menulis kepada perayu pertama dengan menyatakan bahawa dia telah menganggap dirinya telah dibuang kerja secara konstruktif berkuat kuasa dari 12 Julai 2005; juga, di dalam surat yang sama dia memberi notis tiga bulan terhadap peletakan jawatannya seperti yang dikehendaki oleh kontrak pekerjaannya dan terus bekerja untuk tiga bulan

tersebut dengan menerima gaji dan faedah biasanya. Dalam memutuskan dapatan Mahkamah Perusahaan yang Yap Fat telah dibuang kerja secara tidak adil, Mahkamah Tinggi memutuskan bahawa Yap Fat tidak dibayar kenaikan gaji atau bonus bagi tahun-tahun 2004 dan 2005 dan bahawa pemindahan fungsi 'agency' daripada portfolionya kepada Jabatan Pentadbiran Kredit bank adalah penurunan pangkat dan/atau penganiayaan. Dalam rayuan ini, perayu-perayu berhujah bahawa Yap Fat tidak dibuang kerja secara konstruktif tetapi dia telah secara rela meletakkan jawatan dengan memberi notis peletakan jawatan seperti kontrak pekerjaan dan bahawa semasa tempoh notis dia terus menerima gaji bulanannya dan faedah kontraktual lain.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Dalam keseluruhan tinjauan am keterangan yang dikemukakan dalam rayuan ini, pembuangan konstruktif yang dihujahkan oleh Yap Fat tidak mempunyai kebenaran dan dia gagal untuk melepaskan beban membuktikan bahawa terdapat apa-apa pelanggaran kontrak pekerjaan oleh perayu, apatah lagi satu yang menjadi asas kontrak yang menjustifikasikan peletakan jawatannya (lihat perenggan 18).

(2) Dakwaan bahawa CEO baru menahan bayaran kenaikan gaji dan bonus Yap Fat dilampirkan di dalam emel yang diteliti oleh mahkamah menunjukkan bahawa tiada di mana-mana terdapat apa-apa arahan oleh CEO baru untuk menahan bayaran bonus dan gaji kepada Yap Fat. Emel bersifat am dan tidak membuat apa-apa rujukan langsung kepada Yap Fat. Mahkamah kita telah secara konsisten menerima dan memutuskan bahawa apa-apa kenaikan tahunan gaji atau bayaran bonus adalah pada budi bicara pihak pengurusan. Mengenai pemidahan fungsi 'agency' daripada portfolio Yap Fat, ini adalah prerogatif CEO dan telah dilaksanakan mengikut struktur penyusunan semula yang diarahkan oleh CEO baru. Tindakan-tindakan ini tidak boleh ditafsirkan sebagai pelanggaran mengikut hubungan pekerjaan di antara Yap Fat dan perayu-perayu. Penyingkiran tugas dan tangungjawab tertentu daripada portfolio Yap Fat tidak membentuk penurunan pangkat kerana dia terus menikmati gaji bulanannya dengan faedah yang lain yang diberikan kepadanya di bawah kontrak pekerjaan semasa tempoh notis tiga bulan tersebut (lihat perenggan 22–23 & 25–26).

(3) Notis tiga bulan yang diberikan dalam surat Yap Fat bertarikh 12 Julai 2005 adalah pelaksanaan sukarela haknya di bawah kontrak pekerjaan dan perayu-perayu hanya menerima notis peletakan jawatannya. Ia tidak ditunjukkan bahawa surat dicela dengan penipuan atau paksaan. Kelewatan Yap Fat lebih kurang lima bulan dalam meninggalkan pekerjaan menunjukkan bahawa tidak terdapat apa-apa tindakan oleh perayu-perayu yang menyebabkan pekerjaan seterusnya mustahil, tidak

munasabah dan tidak tertanggung seperti yang didakwa olehnya. Dalam tuntutan untuk pembuangan kerja konstruktif, ia adalah penting untuk pekerja mengambil langkah-langkah segera untuk keluar daripada pekerjaannya dalam masa munasabah selepas pelanggaran kontrak yang didakwa jika gagal pekerja akan dianggap mengetepikan pelanggaran dan bersetuju untuk mengubah kontrak (lihat perenggan 27–30).]

Notes

For cases on constructive dismissal in general, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1057–1058.

Cases referred to

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599, CA (refd)
Bayer (M) Sdn Bhd v Anwar bin Abdul Rahim [1995] MLJU 558; [1996] 2 CLJ 49, HC (refd)
Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84 (refd)
Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor [2010] MLJU 2186; [2011] 3 CLJ 929, HC (refd)
Joseph v Rey Lenferna Ltd (2008) SCJ 342, SC (refd)
Kelang Container Terminal Sdn Bhd v Tuan Syed Khadzail bin Syed Salim [1993] 1 ILR 1, IC (refd)
Lim Seng Huat lwn Fiamma Sdn Bhd [1996] 3 MLJ 604; [1997] 1 CLJ 90, CA (refd)
Moo Ng v Kiwi Products Sdn Bhd Johor & Anor [1998] MLJU 83; [1998] 3 CLJ 475, HC (refd)
Murray v Minister of Defence (2008) 29 ILJ 1369, CA (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)
Western Excavating (ECC) Ltd v Sharp [1978] QB 761, CA (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1989] 1 CLJ Rep 298, SC (refd)

Appeal from: Application for Judicial Review No 25–224–12 of 2014 (High Court, Kuala Lumpur)

Thavalingam (Sharan Kaur Gill with him) (Lee Hishammuddin Allen & Gledhill) for the appellants.
YY Ho (Esther Hor with him) (YY Ho & Lee) for the first respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is directed against the decision of the High Court dated 15 March 2016 dismissing the appellants' application for judicial review to

quash the award made by the Industrial Court vide Award No 1120 of 2014 which was handed down on 30 September 2014. In the terms of the award, the Industrial Court found that the first respondent's dismissal was without just cause or excuse.

BACKGROUND FACTS

[2] By and large, the facts in this instant appeal were in common ground. Such facts included the following:

(a) the first respondent was employed by Southern Investment Bank Bhd ('SIBB') (formerly known as 'Perdana Merchant Bankers Bhd') in 1994. The first respondent was subsequently promoted to be the Vice President in 1995, Senior Vice President and acting Chief Executive Officer ('CEO') in addition to his position as Director, Head of Capital Market Department, in 1998;

(b) on 1 March 2015, one Goh Ching Yin ('Mr Goh') was appointed as a new CEO in SIBB;

(c) on 26 May 2005, a meeting was convened between Mr Goh and the first respondent to discuss the first respondent's future in SIBB. During the meeting, Mr Goh conveyed the order given by Tan Sri Tan Teong Hean for the first respondent to leave the appellants' bank. Mr Goh also informed the first appellant that if he resigned voluntarily in writing, he will be paid the bonus and salary increment which was due to be paid soon;

(d) the first respondent was shocked and asked for reasons why he was told to resign after all his years of service and contribution to the appellants' bank;

(e) on 1 June 2015, the first respondent wrote a letter to SIBB and placed on records the events which had transpired during the meeting between Mr Goh and him on 16 May 2015 and stated that he was refused to resign from SIBB as requested. There was no reply from the appellants;

(f) on 12 July 2005, the first respondent wrote another letter to SIBB. In the said letter, the first respondent had expressly stated that he considered himself constructively dismissed with effect from the date of the letter, ie 12 July 2005. In the same breath, the first respondent gave the first appellant three months' notice of his resignation as required by his contract of employment;

(g) the first appellant viewed this letter as a voluntary resignation by the first respondent and responded to the resignation accordingly vide a letter dated 7 October 2015 in which the appellant notified the first

respondent that his last working day is calculated to be on 11 October 2005 — three months from 12 July 2005;

(h) while the first respondent served the three months' notice period, the first respondent continued to enjoy his monthly salary along with other benefits accorded to him under his employment contracts. His last drawn salary was RM18,830;

(i) the dispute between first appellant and the first respondent was referred to the Industrial Court ('the second respondent') for adjudication. As alluded to earlier, the Industrial Court found that the first respondent's dismissal was without just cause or excuse; and

(j) aggrieved by the second respondent's award, the appellants then filed their application for judicial review to quash the award issued by the Industrial Court. On 15 March 2016, the High Court dismissed the appellants' application. Hence, the appellants appealed to this court.

ISSUE

[3] Before us, the sole issue for determination is whether the first respondent had resigned voluntarily from this employment or he was constructively dismissed.

FINDINGS OF THE HIGH COURT

[4] The learned High Court judge's reasoning in deciding that the first respondent was constructively dismissed can be summarised as follows:

(a) no salary increment or bonus was given to the first respondent; and

(b) some of the first respondent's duties and responsibilities were removed from him.

[5] Concerning the issue of salary increment and bonus, the learned High Court judge stated at pp 22–23 of the supplementary record of appeal:

> In his evidence before the 2nd Respondent, the 1st Respondent unequivocally stated that the new CEO implemented his threat where the 1st Respondent was not given salary increment or bonus payment respectively, for the years 2004 and 2005 ... This evidence was unchallenged by the applicants.
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> ...
>
> The 2nd Respondent in its finding concluded that the Applicants committed a breach of a fundamental term which goes to the root of the 1st Respondent's contract of employment.
>
> ...

Having heard the case for twelve days, the 2nd Respondent rightly concluded that the Applicants had breached a fundamental term of the 1st Respondent's contract of employment.

[6] Concerning the removal of the first respondent's duties and responsibilities, the learned High Court judge held that the 'agency' function was removed from the first respondent's portfolio ie from the Capital Market Department to the Credit Administrative Department and such removal can be construed as demotion and/or victimisation.

THE APPEAL

[7] Before us, learned counsel for the appellants submitted that the learned High Court judge erred in law and in fact when Her Ladyship failed to judicially appreciate that:

(a) the first respondent had resigned on his own volition and provided three months prior notice to the appellants of his resignation as required by the terms of his employment;

(b) although the first respondent claims that he had considered himself constructively dismissed, he delayed in leaving employment and continued to enjoy his monthly salary and other employment benefits for a period of three months; and

(c) there was no protest from the first respondent when he was informed by the appellants of his last day of employment.

PARTIES' COMPETING SUBMISSION

[8] Learned counsel for the appellants submitted that the second respondent had erred in law and in fact and had arrived at a decision which no reasonable tribunal similarly circumstanced would have come to and the High Court had similarly erred when it failed to exercise its jurisdiction to amend the errors of law and fact which had been committed.

[9] Learned counsel for the appellants vehemently argued that the first respondent had resigned voluntarily from his employment by giving the appellants three months notice of his resignation. It was the contention of learned counsel that the first respondent had failed to establish that he was dismissed on 12 July 2005 as alleged.

[10] In reply, learned counsel for the first respondent submitted that the first respondent did not voluntarily resign but considered himself to be constructively dismissed by the appellants. The resignation of the first respondent was caused by the sequence of events ie from not getting his

increment and bonus to the removal of his duties and responsibilities. In the circumstances, the first respondent had no choice but to 'resign' and deemed himself to be contractively dismissed by the first appellant.

OUR FINDINGS

[11] Constructive dismissal occurs where an employee resigns because of his employer's behaviour. In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee — unless waiver, estoppel or acquiescence is in issue.

[12] The notion of constructive dismissal comes from the concept that (as it is phrased in United Kingdom): 'An employer must not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee' (see *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 (EAT)).

[13] In *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 95; [1989] 1 CLJ Rep 298 at p 301, Salleh Abas LP explained the meaning of 'constructive dismissal' as follows:

> We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed (see *Bouzourou v The Ottoman Bank* [1930] AC 271 and *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486).
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> In *Bouzourou*'s case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan*'s case the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

[14] Gopal Sri Ram JCA (as he then was) in *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 at p 609; [2001] 1 CLJ 9 at p 19 described 'constructive dismissal' as follows:

> A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a 'constructive dismissal'. There is no magic in the phrase. It simply means this.
>
> An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants

to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong* (ibid). Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held. Generally speaking, he will make life so unbearable for the workman so as to drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact.

[15] There are four conditions which have to be met by an employee to be able to successfully claim for constructive dismissal. The High Court in *Bayer (M) Sdn Bhd v Anwar bin Abdul Rahim* [1995] MLJU 558; [1996] 2 CLJ 49 set out the four conditions as follows:

(1) there must be a breach of contract by the employer;

(2) the breach must be sufficiently important to justify the employee resigning;

(3) the employee must leave in response to the breach and not for any other unconnected reason; and

(4) *he must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.*

(see *Wong Chee Hong v Cathay Organisation*)

Where the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the Act. (Emphasis added.)

[16] The above decision was endorsed by the Court of Appeal in *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599. The appeal against the decision of the Court of Appeal was dismissed by the Federal Court.

[17] It is interesting to note that the Court of Appeal of South Africa formulated the test for constructive dismissal under the common law in *Murray v Minister of Defence* (2008) 29 ILJ 1369 (CA) as follows:

The employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

[18] We agreed with the submission of learned counsel forthe appellants that in the overall conspectus of evidence adduced in this instant appeal, the constructive dismissal contended for by the first respondent was devoid of substance, and he failed to discharge the onus on him to prove that there was any breach of the employment contract by the appellant, let alone one which goes to the root of the contract justifying the resignation of the first respondent.

[19] It is trite that the employee must prove that the employer's action amounted to a fundamental breach of contract or the law. In *Moo Ng v Kiwi Products Sdn Bhd Johor & Anor* [1998] MLJU 83; [1998] 3 CLJ 475, the court stated:

> In a broad sense constructive dismissal occurs when an employer repudiates a contract of employment. The repudiation may take the form of a breach, anticipatory breach or notice of intention. It may be express or implied and it must go to the substance of the contract.
>
> If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract.

[20] It is important, therefore, to be cautious in adopting a wide interpretation of what conduct by an employer that would constitute constructive dismissal because of the danger of inviting a flood of employees who resign and then resile and claim to be constructively dismissed. The paramount consideration is the requirement that the breach must be so serious which goes to the root of the contract and the employee cannot be expected to continue with the contractual arrangement.

[21] We now turn to consider in detail the grounds raised by the appellant in impugning the decision of the learned High Court judge.

SALARY INCREMENT AND BONUS

[22] The first respondent alleged that Mr Goh, the new CEO, withheld payment of his salary increment and bonuses. The allegation was anchored on an email dated 31 May 2005. We have scrutinised the said email and found that nowhere in it is there are any instructions by the new CEO to withhold payment of bonus and salary increment to the first respondent. The email is general in nature and does not make any reference whatsoever to the first respondent.

[23] Our courts have consistently recognised and upheld that any annual increment of salary or bonuses that may be awarded to the employees is at the absolute discretion of the management. In *Lim Seng Huat lwn Fiamma Sdn*

Bhd [1996] 3 MLJ 604; [1997] 1 CLJ 90, this court had adjudicated on this point as follows:

> The payment of bonus is dependent on the discretion of the employer unless the said bonus is a contractual bonus, of which there is no evidence here. Hence the High Court was right in setting aside the bonus award made by the Industrial Court.

REMOVAL OF THE FIRST RESPONDENT'S DUTIES AND RESPONSIBILITIES

[24] The law recognises that in pursuit of its legitimate interest, the management has the prerogative to assign or transfer employees from one area of operation to another provided there is no demotion in rank or diminution of salary, benefits, and other privileges; and the action is not motivated by discrimination, made in bad faith, or effected as a form of punishment or demotion without sufficient cause. This is a privilege inherent in the employer's right to control and manage his enterprise effectively. For this reason, courts often decline to interfere in legitimate business decisions of employers. In fact, industrial relations laws discourage interference in employer's decisions concerning the conduct of their business (see *Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* [2010] MLJU 2186; [2011] 3 CLJ 929 (HC)).

[25] In our view, the transfer of the 'agency' function from the first respondent's portfolio, ie from the Capital Market Department to the Credit Administrative Department, is the prerogative of the CEO and was carried out in line with the structural revamping instructed by the new CEO, Mr Goh. These actions cannot be construed as a breach going to the root of the employment relationship between the first respondent and the appellants.

[26] In our view, the removal of certain duties and responsibilities from the first respondent's portfolio did not constitute a demotion on part of the first respondent. Demotion involves a situation where an employee is relegated to a subordinate or less important position constituting a deduction to a lower grade or rank, with a corresponding decrease in duties and responsibilities, and usually accompanied by a decrease in salary. It is not in dispute that the first respondent continued to enjoy his monthly salary along with other benefits accorded to him under his employment contract during the three months' notice period.

VOLUNTARILY RESIGNATION

[27] We were not persuaded that the first respondent had not voluntarily resigned from his employment. The three months' notice given in the first

respondent's letter of 12 Julyy 2005 was a voluntary exercise of the first respondent's right under his contract of employment and the appellants had merely accepted the first respondent's notice of resignation.

[28] As a former CEO of the company, the first respondent could not have been an unsuspecting or gullible person who misunderstood the importance of the three months' notice given in his letter dated 12 July 2005. Further, there was no showing either that the letter of resignation was tainted with deceit or coercion.

THE FIRST RESPONDENT'S DELAY

[29] That, however, is not the end of the matter. In our view, the first respondent's delay of approximately five months in leaving employment goes to show that there was never any conduct by the appellants which rendered continued employment impossible, unreasonable and unbearable as alleged by the first respondent.

[30] It is trite that in a claim for constructive dismissal, it is imperative for the employee to take immediate steps in walking out of his employment within a reasonable time after the alleged breach of contract. Failing with, the employer will be deemed to have waived the breach and agreed to vary the contract.

[31] In *Kelang Container Terminal Sdn Bhd v Tuan Syed Khadzail bin Syed Salim* [1993] 1 ILR 1, the Industrial Court had this to say on the issue of delay:

> What made the Claimant wait until 24 January 1991 to complain? Why did he delay his departure? Then the speed between his decision to leave and his new employment letter within a period of five days was very unusual. He was to report for duties as Senior Manager of Human Resources and Administration of Celcom on 2 February 1991. I am more inclined to hold the view that it was his new appointment which helped him to make up his mind to leave after he had earlier elected to stay on.
>
> After considering the facts and surrounding circumstances of this case this Court finds that the Company had breached the terms of the contract of employment of the Claimant but the Claimant had by his delay implied that he had elected to affirm the contract rather than accept the repudiation to end the contract. The Court therefore upholds the dismissal.

[32] In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 at p 769C, Lord Denning said that employee 'must make up his mind soon after the conduct which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'.

[33] In *Joseph v Rey Lenferna Ltd* (2008) SCJ 342, the employee had been

the manager of a department with responsibility for sales, marketing and administration as well as technical aspects, but, after a takeover of another company, a co-manager was appointed in respect of the former aspects, while his activity was limited to the technical. It was found on the facts that he had accepted the change without protest and had worked for a month, before deciding to leave and found his own company. His claim for constructive dismissal was dismissed. The Supreme Court said that:

> In a case of constructive dismissal, the employee's response to the employer's conduct is an important factor. The employee must be careful that his response does not imply a willingness to accept the new conditions. He must not stay on in circumstances which imply that he does not regard his employer's conduct as entitling him to terminate his contract of employment.

CONCLUSION

[34] In the premises, we allowed the appeal with costs of RM5,000 and set aside the decision of the learned High Court judge. So ordered.

Appeal allowed and decision of High Court set aside.

Reported by Ashok Kumar